

Department of the Army
Office of Small Business Programs

In-Sourcing Fact Sheet

1. What is in-sourcing?

Answer: In-sourcing converts contractor performance of services to federal government employee performance of these functions. The National Defense Authorization Act (NDAA) for FY08, Section 324 requires that consideration be given to using DoD Civilian employees to perform new functions and those functions currently performed by contractors. In addition, special consideration to in-sourcing shall be given to using government employees for:

- Functions that have been performed by DoD Civilians at any time in the last ten years.
- Functions closely associated with the performance of an inherently governmental function.
- Non-competitive contracts.
- Contracts with excessive costs or of inferior quality.

NDAA08 Section 807 also requires an annual review of our service contract inventory to ensure that we have not contracted for inherently governmental functions, or unauthorized personal services, and that to the maximum extent practicable, we have not contracted for functions closely associated with inherently governmental functions.

2. Why is there such a great focus on in-sourcing within the federal government today?

Answer: The President has a concern that the federal government may be contracting out too many functions that are inherently governmental.

Information on this subject can be found at:

http://www.whitehouse.gov/the_press_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies-Subject-Government/

http://www.whitehouse.gov/omb/procurement_index_gov_contracting/#guidance

3. What is the definition of inherently governmental?

Answer: An inherently governmental function is one that, as a matter of law and policy, must be performed by federal government employees and cannot be contracted out because it is intimately related to the public interest. Pursuant to the Federal Activities Inventory Reform Act (FAIR), 31 United States Code Section 501, the term includes activities that require either the exercise of discretion in applying Federal Government authority or the making of value judgments in making decisions for the Federal Government, including judgments relating to monetary transactions and entitlements. An inherently governmental function involves, among other things, the interpretation and execution of the laws of the United States so as--

(i) to bind the United States to take or not to take some action by contract, policy, regulation, authorization, order, or otherwise;

(ii) to determine, protect, and advance United States economic, political, territorial, property, or other interests by military or diplomatic action, civil or criminal judicial proceedings, contract management, or otherwise;

(iii) to significantly affect the life, liberty, or property of private persons;

(iv) to commission, appoint, direct, or control officers or employees of the United States; or

(v) to exert ultimate control over the acquisition, use, or disposition of the property, real or personal, tangible or intangible, of the United States, including the collection, control, or disbursement of appropriated and other Federal funds.

DoD Instruction 1100.22 and FAR Subpart 7.5 also provide guidance on what is an inherently governmental function.

It should be noted that a new definition of inherently governmental is forthcoming. President Barack Obama directed the Office of Management

and Budget to develop a more clear definition of inherently governmental that was scheduled for release by September 30, 2009.

4. What is the definition of personal services?

Answer: Pursuant to FAR Subpart 37.104, a personal services contract is characterized by “the employer-employee relationship it creates between the Government and the contractor’s personnel. The Government is normally required to obtain its employees by direct hire under competitive appointment or other procedures required by the Civil Service laws. Obtaining personal services by contract rather than by direct hire under competitive appointment circumvents those laws unless Congress has specifically authorized acquisition of those services.” If the contract by its written terms or in the way it is actually performed, involves any of the following items, it must be modified, performed in a way that avoids creating an employer-employee relationship or in-sourced: 1) contractor personnel are subject to relatively continuous supervision and control of a government officer; 2) contractor is performing on a government site; 3) principal tools and equipment are furnished by the government; 4) services are applied directly to the integral effort of the agency; 5) the need for the service can reasonably be expected to last beyond one year; or 6) the inherent nature of the service or the manner in which it is provided, reasonably require (directly or indirectly) government direction or supervision of contractor employees in order to adequately protect the government’s interest, retain control of the function involved, or retain full responsibility for the function supported in a duly authorized Federal officer or employee.

5. What are functions closely associated with inherently governmental functions?

Answer: In defining certain functions as “closely associated with inherently governmental,” 10 USC 2383 (b) (3) incorporates by reference the list of functions at FAR Subpart 7.503 (d):

The following is a list of examples of functions generally not considered to be inherently governmental functions. However, certain services and actions that are not considered to be inherently governmental functions may approach being in that category because of the nature of the function, the manner in which the contractor performs the contract, or the manner in which the Government administers contractor performance. This list is not all inclusive:

- (1) Services that involve or relate to budget preparation, including workload modeling, fact finding, efficiency studies, and should-cost analyses, etc.
- (2) Services that involve or relate to reorganization and planning activities.
- (3) Services that involve or relate to analyses, feasibility studies, and strategy options to be used by agency personnel in developing policy.
- (4) Services that involve or relate to the development of regulations.
- (5) Services that involve or relate to the evaluation of another contractor's performance.
- (6) Services in support of acquisition planning.
- (7) Contractors providing assistance in contract management (such as where the contractor might influence official evaluations of other contractors).
- (8) Contractors providing technical evaluation of contract proposals.
- (9) Contractors providing assistance in the development of statements of work.
- (10) Contractors providing support in preparing responses to Freedom of Information Act requests.
- (11) Contractors working in any situation that permits or might permit them to gain access to confidential business information and/or any other sensitive information (other than situations covered by the National Industrial Security Program described in 4.402(b)).
- (12) Contractors providing information regarding agency policies or regulations, such as attending conferences on behalf of an agency, conducting community relations campaigns, or conducting agency training courses.
- (13) Contractors participating in any situation where it might be assumed that they are agency employees or representatives.
- (14) Contractors participating as technical advisors to a source selection board or participating as voting or nonvoting members of a source evaluation board.

- (15) Contractors serving as arbitrators or providing alternative methods of dispute resolution.
- (16) Contractors constructing buildings or structures intended to be secure from electronic eavesdropping or other penetration by foreign governments.
- (17) Contractors providing inspection services.
- (18) Contractors providing legal advice and interpretations of regulations and statutes to Government officials.
- (19) Contractors providing special non-law enforcement, security activities that do not directly involve criminal investigations, such as prisoner detention or transport and non-military national security details.

6. Who determines what services are inherently governmental?

Answer: Department of Defense Directive 1100.22 requires the manpower official in each service to make determinations as to whether functions to be contracted are inherently governmental or exempt from private sector performance. The Assistant Secretary of the Army, Manpower And Reserve Affairs (M&RA) is the manpower official for the Army. The requiring activity makes the recommendation.

7. Where can I find the inventory of contracts for services pursuant to section 807 of the National Defense Authorization Act for 2008?

Answer: The list can be found at <http://www.asamra.army.mil/insourcing>

8. What is the impact of the decision to in-source on current contracts and any remaining option years?

Answer: Depending on the circumstances, current contracts which the Army has decided to in-source may continue through the end of the current performance period. In some cases options may not be exercised.

9. Is there a requirement to consider the impact on small business firms prior to insourcing a function or requirement?

Answer: No. There is no provision in either law or policy that requires consideration of impact on small businesses prior to insourcing.

10. What laws, regulations, and policies govern in-sourcing?

Answer:

A. Most Recent Army Guidance

- SA Memo 10 JUL 09 – Army Policy for Civilian Workforce Management and Service Contracts
- Request for Contract Services Decision Tree
- Request for Service Contract Approval (including Worksheets A through D) (The “Checklist”)

B. Statutes

- 10 USC Section 2463 (as added by NDAA 08 Section 324)
- 10 USC Section 2330a (as amended by NDAA 08 Section 807)
- 10 USC Section 2383
- 10 USC Section 115a
- 10 USC Section 129
- 10 USC Section 129a

C. Federal Acquisition Regulation (FAR)

- FAR Subpart 7.5(c) Examples of Inherently Governmental Functions
- FAR Subpart 7.5 (d) Examples of Functions Closely Related to Inherently Governmental Functions
- FAR 37.104 Definition of Personal Services Contracts

D. Office of Management and Budget (OMB)

- OMB Memo 29JUL09 Managing the Multi Sector Workforce

E. Office of the Secretary of Defense (OSD)

- DepSecDefMemo 28MAY09 In-sourcing Implementation Guidance
- DepSecDefMemo 04APR08 NDAA Sec 324 Implementation
- DODI 1100.22 04APR07 Guidance for Determining Workforce Mix

F. Secretary of the Army (SECARMY)

- SA Memo 04SEP07 Army Policy for Civilian Workforce Management
- SA Memo 02FEB07 Lifting of Civilian Hiring Restrictions
- SA Memo 29JAN07 Improved Management of Service Contracts
- SA Memo 23FEB06 Army Policy for Civilian Hiring
- SA Memo 07JAN05 Accounting for Contract Services

11. Where can I find additional information?

Answer: <http://www.asamra.army.mil/insourcing>

Request For Feedback

If your business has been impacted by in-sourcing, please submit a short narrative of how your business has been impacted. Submit your comments to Ms. Cynthia Lee. Her email address is: cynthia.r.lee@conus.army.mil